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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALAMEDA BELT LINE, Plaintiff and Appellant, v. CITY OF ALAMEDA, Defendant and Respondent.	A118596 (Alameda County Super. Ct. No. C-826373-7)

In this matter we address the interpretation, enforceability and scope of a repurchase option negotiated 85 years ago between a municipality and two national railroad companies. The central focus of the dispute is whether a 22-acre parcel of what is now particularly valuable real property, acquired subsequent to the execution of the agreement, is subject to the option, and whether the option remains enforceable. In a prior reported decision (*Alameda Belt Line v. City of Alameda* (2003) 113 Cal.App.4th 15 (*Alameda Belt Line*)) we reversed a grant of summary judgment in favor of the plaintiff after the trial court originally found the option to be unenforceable, and remanded for consideration of parol evidence to ascertain the meaning of certain contractual terms, and to then determine, guided by that evidence, whether the real property in issue is subject to the option. (*Id.* at p. 25.) On remand, after a non-jury trial, the court found the option terms sufficiently definite and certain to permit enforcement, and found the disputed property to be subject to the option. Judgment was entered in favor of the City of

Alameda (City), requiring appellant to convey the disputed property and other assets of appellant. We will affirm.

BACKGROUND

The underlying historical facts are essentially undisputed. A "belt line" railroad track was built by the City in 1918 to serve industries on the east end of the island's northern waterfront. The track, which was initially operated by Southern Pacific Railroad under an "informal" license arrangement with the City, connected the industries to line-haul (long distance) railroads. The rail line began at the Miller-Sweeney (Fruitvale) Bridge, which connects Alameda to Oakland, and traveled west along Clement Avenue for 1.2 miles.

Thereafter, the City decided that it needed to extend the belt line railroad to serve a growing industrial base and promote development along the waterfront. Because it needed to secure private financing for the extension and because it wanted to provide all three transcontinental railroads direct access to the belt line railroad, the City entered negotiations with the railroads.

In 1924, the City entered into an agreement (1924 Agreement or Agreement) with Western Pacific Railroad Company (Western Pacific) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) to extend and operate the belt line railroad. Western Pacific and Santa Fe agreed to form a new company, Alameda Belt Line (ABL), which would purchase the existing belt line railroad from the City for $30,000, extend the railroad along a specified route, and operate the railroad. The City reserved a right to repurchase the railroad and its extensions at any time on one year's notice at a price based on cost. That repurchase right or option, which appears in Paragraph 14[1] of the 1924 Agreement, is at the heart of the parties' dispute. It provides:

[1] Consistent with the usage of the parties and the trial court, we refer to the numbered parts of the 1924 Agreement as paragraphs, although the Agreement itself uses the term section.

"Said City shall have the right at any time hereafter to purchase said belt line railroad *including all extensions thereof*, for a sum equal to the original cost, together with the cost of any and all *additional investments and extensions* made therein by said [ABL], provided, that said City shall give at least one year's previous notice of its intention so to do by ordinance to that effect; and provided that at the same time it purchases from the parties of the first part, or either of them, as the case may be, the branch railroad, extensions and spur tracks referred to in the twelfth section hereof.

"It is agreed that said [ABL] will keep an accurate account of the cost of additional investments and extensions, and file a verified report thereof annually with the City Clerk of said City, similar to the report filed with the Railroad Commission. It is further agreed and understood that the term 'investments' as herein used shall not include the cost of upkeep and repairs." (Italics added.)

The acquisition and extension of the belt line railroad received required regulatory approvals after hearings before the Interstate Commerce Commission (ICC) and the California Railroad Commission (Railroad Commission). The regulatory filings, and related hearing testimony, described the proposed expansion and "extensions" of the railroad. After approval, Western Pacific and Santa Fe then formed ABL, and the new company purchased the existing railroad from the City. ABL extended the railroad south for about two blocks along an S-curve from the intersection of Clement Avenue and Minturn Street to the intersection of Hibbard Street and Buena Vista Avenue. The railroad then continued west on Buena Vista Avenue for several blocks, and turned north along Sherman Street (which merges with Atlantic Avenue), where it entered the east end of a 22-acre rail yard or switching yard (the Rail Yard). ABL also built track running west from the Rail Yard along Atlantic Avenue (now Ralph Appezzato Memorial Parkway) to the former Alameda Naval Air Station.

The Rail Yard contained 13 tracks, including the main line that entered from Sherman Street and 12 switching or yard tracks. In the Rail Yard, inbound rail cars

arriving from line-haul (long distance) railroads were separated and reordered for delivery to industrial customers, and outbound rail cars from those industries were reordered for delivery to the line-haul railroads. Switching was the main function of the belt line railroad, which performed all of its operations within the City of Alameda.

Beginning in the 1970s, ABL began to decrease its operations and remove track. The railroad also sold some of its real property. In November 1998, the railroad completely ceased operations and by the middle of 1999, the only track left was on Clement Avenue.

As of 1999, ABL's real property consisted of six areas of land scattered along the route of the former rail line. The company owned two areas of land south of Clement Avenue where the railroad extension had made its S-curve south from the original railroad to Buena Vista Avenue.[2] The company also owned property northeast of the intersection of Buena Vista Avenue and Sherman Street, where the extension turned north from Buena Vista Avenue along Sherman Street to enter the Rail Yard. The company owned the Rail Yard, its most valuable piece of property, as well as a 74 square foot parcel on Sherman Street near the Rail Yard. Finally, it owned property along former Atlantic Avenue where the spur track to the naval air station once ran (Atlantic Avenue Property). ABL no longer owns the rights to run a rail line along the entire former route of the belt line railroad; it has sold some property along the route and has lost the easements it formerly owned to run track over some property owned by others.

In January 1999, ABL and Sun Country Beltline, LLC entered into an agreement for the sale of the Rail Yard for potential residential development at a price of $17.7 million. On November 2, 1999, the Alameda City Council passed an ordinance notifying

[2] This area included property in the city block bounded by Clement Avenue, Grand Street, Eagle Avenue and Minturn Street and property in the block bounded by Eagle Avenue, Grand Street, Buena Vista Avenue and Hibbard Street.

ABL of its intention to exercise its rights under Paragraph 14 of the 1924 Agreement and repurchase the belt line railroad and "all extensions thereof" in one year.

Initial Trial Court Proceedings

On May 11, 2000, ABL filed a complaint seeking a judicial declaration that the City's repurchase right under Paragraph 14 of the 1924 Agreement was null and void; an injunction requiring the City to cease its efforts to obtain ABL and its property without paying just compensation; and just compensation for the taking and damaging of its property. The City filed a cross-complaint. As amended, the cross-complaint alleged causes of action for anticipatory breach of contract, constructive trust and declaratory relief, which asked the court to declare that Paragraph 14 of the 1924 Agreement was enforceable.[3]

In March 2002, the trial court granted summary adjudication to ABL on its declaratory relief cause of action: "The Court finds as a matter of law that the alleged repurchase option i[s] not sufficiently definite in order to be a valid and enforceable option under the statute of frauds. [Citations.] The Court notes that the language in Paragraph 1 of the Agreement sets out in considerable detail the description of what was originally conveyed, including the land areas involved. However, the alleged repurchase option does not provide a description which is itself definite and certain, or which fulfills

[3] The City conditioned its prayer for relief on any orders or required proceedings of the federal Surface Transportation Board (Board). ABL argued that the Board had exclusive jurisdiction over all railroad ownership issues and the trial court lacked jurisdiction to approve the City's acquisition of the railroad. In December 2005, the City filed a verified notice of exemption with the Board pursuant to title 49 Code of Federal Regulations, section 1150.31 to acquire the belt line railroad from ABL. In April 2006, the Board denied ABL's request for a stay of the notice and held that the superior court had jurisdiction to determine the rights and obligations of the parties under the 1924 Agreement. In June 2006, the trial court granted the City's motion to amend its second amended cross-complaint to conform to proof and, "as a result of the April 3, 2006 Surface Transportation Board ruling," to add a cause of action for specific performance. So amended, the cross-complaint sought an order that ABL unconditionally convey "the belt line railroad and all extensions thereof" to the City.

the test of reasonable certainty by furnishing the 'means or key' by which the description may be made certain and identified with its location on the ground." The court issued a judgment for ABL, ruling that the summary adjudication order effectively disposed of all of the issues in the action, and the City appealed.

Prior Appeal

In November 2003, this court vacated the trial court's orders. (*Alameda Belt Line, supra,* 113 Cal.App.4th at p. 18.) We defined the issue on appeal as "whether extrinsic or parol evidence coming into existence *after* the execution of a written agreement may be considered in order to satisfy the statute of frauds, and render the agreement sufficiently certain to be enforceable." (*Ibid.*)

On the statute of frauds issue, we held "the contractual language, 'said belt line railroad including *all extensions thereof*,' (italics added) is a sufficient 'means or key' by which extrinsic or parol evidence could be used to define the property which is the subject of the option. According to the City, . . . ' . . . [t]he conveyance documents for the original railroad and later acquired property for the extensions make the property to be conveyed identifiable, and in compliance with the statute of frauds.' . . . [S]uch evidence, together with the contractual language, could be considered as a means or key to satisfy the statute of frauds." (*Alameda Belt Line, supra*, 113 Cal.App.4th at p. 22, applying *Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769 & *Love v. United States* (E.D.N.C. 1994) 889 F.Supp. 1548.)

On the certainty issue, we wrote: "We agree the repurchase option in this case is somewhat unusual, since it sought to include not only the original railroad, but also property that was to be acquired in the future for 'extensions thereof.' However, this unusual feature does not necessarily make the 1924 agreement fatally uncertain. The language of the option greatly narrows and defines the property in issue, insofar as it limits the City's right to repurchase the original railroad and its 'extensions *thereof*.' (Italics added.) Only the original property, or new lands or other property acquired to

provide 'extensions' of the operations of the original railroad, would seemingly be covered by the repurchase option." (*Alameda Belt Line, supra,* 113 Cal.App.4th at p. 25.)

We also provided guidance for proceedings on remand: "In summary, we see two steps in the interpretation of the agreement entered into between the City and ABL. First, extrinsic or parol evidence may be considered to ascertain the parties' meaning of the words 'extensions thereof' when they entered the contract. Second, guided by this evidence, it could be determined with certainty whether the real property in issue here is subject to the repurchase option of the agreement. We do not yet know what will be concluded, in light of the extrinsic or parol evidence. We only rule that the order granting summary judgment against the City should be vacated, in order to allow for further proceedings consistent with the views expressed in this opinion." (*Alameda Belt Line, supra,* 113 Cal.App.4th at p. 25.)

Proceedings on Remand

On remand, a bench trial commenced in April 2006.[4] In addition to consideration of the documentary historical record, two witnesses testified as to the meaning of the language used in the 1924 agreement. Phillip Edward Copple, superintendent of the ABL railroad from 1970 until it ceased operations in 1998, described the railroad's operations and its process of shutting down. He also testified about his understanding of certain terms as used in the railroad industry, including the term "extension."

The City's expert witness, Thomas D. Crowley, an economist with 35 years of experience consulting on railroad transportation accounting and contract issues, testified that several of the key terms in Paragraph 14 of the 1924 Agreement, including "extensions" and "investments," had fixed meanings in the context of railroad accounting and financial transactions at the time the Agreement was drafted, which have not changed

[4] Before trial, the court granted summary adjudication to the City on ABL's claim for inverse condemnation (just compensation).

since that time. The terms were defined in the ICC's Uniform System of Accounts, an accounting system that all railroads were required to follow in their reports to the ICC and the Railroad Commission.

The crux of Crowley's testimony was that the "investments" reported in ABL's annual corporate reports and in its regulatory filings encompassed all of the property subject to the City's repurchase right under Paragraph 14 and established the repurchase price for that property.[5] ABL kept track of its cumulative "investment" in the railroad in its annual reports and regulatory filings. The figure was regularly adjusted to add the cost of new investments and deduct the original cost of investments that had been retired (i.e., sold or otherwise disposed of). It included the cost of extensions, but not the cost of repairs. As of December 31, 2005, the "investment" figure was $966,027. Crowley testified that the figure included the cost of all property covered by Paragraph 14 of the 1924 Agreement,[6] but he did not specifically identify which property of ABL (e.g., particular parcels of land or specific interests in those parcels) was covered by the investment figure.

The trial court enforced the repurchase option, ordering ABL to sell the City "the belt line railroad" for $966,027. As relevant to this appeal, the court ruled that Paragraph 14 of the 1924 Agreement was sufficiently certain to be enforceable, that the Rail Yard was an " 'extension' as that term was used in the Agreement," and further that the option was not unenforceable under the doctrine of frustration of purpose. The court entered judgment for the City and attached a detailed description of the property covered

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[5] The annual verified reports of "the cost of additional investments and extensions" required by Paragraph 14 of the Agreement were never filed by ABL.

[6] The second proviso of the first paragraph of Paragraph 14—"provided that at the same time it purchases . . . the branch railroad, extensions and spur tracks referred to in the twelfth section hereof"—refers to a ferry slip extension that was never built by the parent companies of ABL and thus is not covered by the City's exercise of its repurchase right.

by the sale. The property description included all of the real property then owned by ABL, including the Rail Yard, as well as the company's interest in a trackage agreement and certain railroad equipment. ABL moved for a new trial on grounds not renewed on appeal, and the court denied the motion.

DISCUSSION

ABL raises three issues on appeal. First, it argues that the Rail Yard cannot be considered an "extension" as that term is used in the Agreement, contending that only the track extensions immediately planned in 1924 to provide expanded industrial service, and which were then specifically approved by the ICC and the Railroad Commission, were contemplated by the parties as "extensions." Second, it argues that, as to property which is within the scope of the repurchase option, the City's right is limited to acquiring an easement to operate a municipal rail line over such land, and that any such easement rights were extinguished by the cessation of the belt line railroad's operations. Finally, ABL argues that the Paragraph 14 repurchase right is unenforceable under the doctrine of frustration of purpose. We reject all of ABL's arguments and affirm the judgment of the trial court.

I. *Standard of Review*

ABL insists that we must review de novo, focusing on the "undisputed, written evidence." The City contends that we must give appropriate deference to the findings of the trial court based on its consideration of the extrinsic evidence presented, applying the substantial evidence standard.

Our standard of review depends on whether there was a conflict in the extrinsic evidence admitted to assist in interpretation of the Agreement. When there is no material conflict in the extrinsic evidence, the court interprets the contract as a matter of law. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 (*City of Hope*); *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.) This is true even when conflicting inferences may be drawn from the undisputed extrinsic

evidence. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439; *Parsons*, at p. 866, fn. 2.) "Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. (*Parsons*[, at p. 865] . . . .) But when . . . ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact . . . (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 289 ['since the interpretation of the crucial provisions turned on the credibility of expert testimony, the court did not err in submitting the construction of the contract to the jury']).") (*City of Hope*, at p. 395, fn. omitted.)

Once extrinsic evidence is considered, the ultimate construction placed upon ambiguous language is therefore subject to differing standards of review, depending upon the parol evidence used to construe the contract. Factual findings based on conflicting evidence must be sustained if supported by substantial evidence, and we review conclusions of law based on those findings de novo. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1268 & fn. 4.)

II. *Principles of Contract Interpretation*

In construing the 1924 Agreement, we apply general principles of contract interpretation. "The overriding goal of contract interpretation is to give effect to the mutual intention of the parties at the time of contracting, 'so far as the same is ascertainable and lawful.' (Civ. Code, § 1636.) Faced with contract language that is reasonably susceptible to more than one meaning, certain general rules of contract interpretation come into play to aid the court in resolving the ambiguity. (See *id.* § 1637.) To begin with, the words of a contract are to be understood in their ordinary and popular sense unless the parties use them in a technical sense or 'a special meaning is given to them by usage . . . .' (*Id.* § 1644.) Technical words generally are interpreted 'as

usually understood by persons in the profession or business to which they relate . . . .' (*Id.* § 1645.) [¶] . . . [¶] . . . Indeed, where there is a fixed and established usage and custom of trade, the parties are presumed to contract pursuant thereto. (*Reely v. Chapman* (1960) 177 Cal.App.2d 260, 262 . . . ; see Civ. Code, § 1655.) Thus, courts can rely on usage and custom to imply a term where the contract itself is silent in that regard.

"Extrinsic evidence on all these circumstances and matters can be offered where it is obvious that a contract term is ambiguous, but also to expose a latent ambiguity. 'The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' (*Pacific Gas & E. Co*. v. *G. W. Thomas Drayage etc. Co*. (1968) 69 Cal.2d 33, 37 . . . .)" (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1240-1241 (*Southern Pacific*).)

III. *The Rail Yard Is Subject to the Repurchase Option*

The trial court found that the Rail Yard was an "extension" within the meaning of the phrase "said belt line railroad including all extensions thereto" in Paragraph 14 and thus was covered by the City's repurchase right. The City urges us to affirm that ruling or, in the alternative, to hold that the repurchase right includes "investments" in the railroad and that the Rail Yard is such an investment. We agree with the trial court's finding that the Rail Yard was an "extension" covered by the repurchase right and hold, in the alternative, that the Rail Yard was an "investment" covered by the repurchase right.

A. *Extensions*

ABL argues the trial court's ruling on whether the Rail Yard was an "extension" within the meaning of Paragraph 14 is subject to independent rather than substantial evidence review since Crowley's testimony was the only extrinsic evidence offered on the issue and his testimony and credibility were undisputed. It further argues that

Crowley's testimony necessarily excludes the Rail Yard from the definition of an "extension."

ABL focuses on Crowley's testimony that an "extension" is the " 'land and fixed improvements provided and arranged for in the original plan for the construction of extensions of existing main lines, additional branch lines, and the extensions of existing branch lines.' " Crowley added that "the key point of an extension is the land and fixed improvement provided and arranged for in the original plan. The original plan is the key to an extension. If you have, as part of the approval process for building a road or buying equipment, a plan to extend, . . . you didn't have to go back for reapproval of the report." Relying on this testimony, ABL argues that "extensions" are limited to the "original plan" for extension as described in Paragraph 1 of the Agreement and in the ICC and Railroad Commission orders.

There are two difficulties with this argument. First, ABL's own witness, Copple, testified on cross-examination that the term "extensions" as used within his experience in the railroad industry, would include any place that new tracks were put down, and he testified that all 13 tracks in the Rail Yard were "extensions." Second, as discussed infra, the evidence does not establish that the "original plan" is as narrowly constrained as ABL contends.

ABL argues that Copple's testimony on the issue was irrelevant because he "was an operations guy[,] not a legal expert on the definition of railroad terms as used in 1924," and was not involved in the 1924 negotiations. Copple, however, had more than 35 years of experience in the railroad industry, most of it working as a superintendent for ABL, and he regularly used the ICC Uniform System of Accounts on which Crowley based his expert testimony. Crowley testified that the meaning of "extension" had not materially changed since 1924. Therefore, Copple's testimony was competent evidence of the meaning of "extensions" in the 1924 Agreement.

To the extent that ABL argues that Copple's testimony is inconsistent with that of Crowley on the definition of "extensions," any such conflict in the extrinsic evidence would be subject to review on the substantial evidence standard and the trial court's determination is more than adequately supported by the record.

To the extent that we review "undisputed" parol evidence and the inferences to be drawn from that evidence de novo, we would also find that the Rail Yard is included within the property covered by the Paragraph 14 repurchase option as an "extension."

Paragraph 1 of the Agreement describes a route that includes the Rail Yard. Paragraph 1(b) describes an extension path south from Clement Avenue along an S-curve to Buena Vista Avenue, west along Buena Vista Avenue to Benton Street (near Sherman Street), north from Buena Vista Avenue to a point north of Eagle Avenue, "and continuing westerly over other private rights of way and crossing all intervening streets to the western side of Webster Street . . . ." The Rail Yard lies north of Buena Vista and Eagle Avenues to the west of Benton Street, and it extends west all the way to Webster Street. Moreover, subdivision (c) of Paragraph 1 includes "such other streets and rights of way in said City, the right to use which shall have been lawfully granted to said [ABL]." ABL does not explain why this broadly inclusive language is not also part of the "original plan" within the ICC definition of "extension." As ABL itself notes, the City contemporaneously identified the parties' "plan" as the "plan . . . set forth in [the] contract entered into . . . December 15, 1924," not as the plan set forth in Paragraph 1(b) of the contract.

The ICC and Railroad Commission decisions also include the location of the Rail Yard in their descriptions of the proposed extension of the belt line railroad. The Railroad Commission decision describes the "proposed extension" in terms similar to those of Paragraph 1(b) of the 1924 Agreement, including a path from a point north of Buena Vista Avenue and Benton Street and 1,000 feet south of the estuary, thence "in a general westerly direction over private rights of way and crossing all intervening streets

to the westerly side of Webster street . . . ." Similarly, the ICC decision broadly identified the "extension" to include a "westerly extension [from the existing railroad] to the shore line of San Francisco Bay," which includes the location of the Rail Yard.

Moreover, the regulatory agency decisions included the cost of the Rail Yard in the anticipated costs of the venture, using language that appears to include the Rail Yard in the proposed extension. The Railroad Commission decision authorized the issuance of stock to cover the expenses of the project, which it described as the cost "to extend the line . . . to the westerly line of Webster street, including . . . [a] classification yard,[7] track scales, water and oil facilities, and engine house." Similarly, the ICC decision identified the costs of the project as "the cost of the proposed extension . . . together with . . . classification yard, track scales, water and oil facilities, and engine houses." While somewhat ambiguous, these passages do not, as ABL argues, clearly *segregate* the costs of "extensions" from other costs of the railroad such as the Rail Yard.

In sum, even if we were to assume that "extensions" refers only to extensions identified in an "original plan" for the belt line railroad, ABL's narrow view of the "original plan" for the extension is not supported by the evidence.

ABL argues that a definition of "extension" that includes the Rail Yard is inconsistent with statutory and case law that distinguishes between "extensions," which require regulatory approval before construction, and spur, industrial, team, switching or side tracks, which do not. (See *Detroit & M. Ry. Co. v. Boyne City, G. & A.R. Co.* (1923) 286 F. 540, 542, 547 [applying Transportation Act, 1920, c. 91, § 402, 41 Stats. 456, 477, ¶¶ 18-22]; *Nicholson v. Missouri Pacific Railroad Co.* (1982) 366 I.C.C. 69 [applying successor statutes]; see also *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.* (1926) 270 U.S. 266, 270 [applying Transportation Act, 1920, c. 91, § 402, 41 Stats. 456, 477, ¶ 18].) Because the Rail Yard contained switching tracks, ABL

[7] Copple testified that ABL's Rail Yard could be called a "classification yard."

contends that it cannot be an "extension" under this case law. However, the Rail Yard also contained the main track of the belt line railroad, which (as described in Paragraph 1 of the 1924 Agreement and the agency decisions) ran through the Rail Yard and continued west over the Atlantic Avenue Property. Moreover, we find that the ancillary tracks are "investments" in the original railroad and its extensions.

B. *Investments*

Even if we were to assume that the Rail Yard was not an "extension" within the meaning of Paragraph 14, we would conclude that the Rail Yard is covered by the repurchase right as an "investment."

ABL argues that "said belt line railroad including all extensions thereof" defines the property the City had the right to repurchase, and the term "investments" as used in the subsequent phrase "a sum equal to the original cost, together with the cost of any and all additional investments and extensions made therein by said [ABL] . . ." is used only to define the price for the covered property without expanding the scope of the covered property.

ABL does not, and could not, argue that the City must pay for "investments" in property it does not have the right to repurchase, an interpretation we would find unreasonable. Rather, it argues the "additional investments" included in the cost (and property covered by the option) are limited to "additional investments" in the original railroad and its extensions (as ABL would narrowly define them), and do not include any other investments in the railroad. ABL does not identify or quantify its "additional investments" in the original railroad and what it would consider "extensions thereto," but it clearly argues they do not include the Rail Yard.[8]

[8] We note that ABL called CPA Jennifer Zeigler to testify at trial on the question of the option exercise price. She testified only as to ABL's total expenditures over the years of operation (approximately $28 million), which would presumably encompass all "investments" during that period, including the cost of the Rail Yard.

As we explain, according to the usage of the parties, "investments" in "road" property such as the extensions had a broad meaning that included the Rail Yard. Crowley testified that "investments" had a fixed meaning that was "accepted," "understood" and "standard" in railroad transactions when the parties drafted the 1924 Agreement. ABL concedes that the drafters of the 1924 Agreement were sophisticated railroad attorneys, who would have been familiar with the established usage of the industry. As noted previously, "Parties are presumed to contract pursuant to a fixed and established usage and custom of the trade or industry." (*Southern Pacific, supra,* 74 Cal.App.4th at p. 1244 [faulting trial court for excluding expert testimony on the meaning of terms as used in railroad transactions].)

The Uniform System of Accounts defines "investment" as " '[t]he cost of original road, original equipment, road extensions, additions and betterments.' " "Road" refers to the rail and *all of the assets that are below the wheels* of the train. "Addition" refers to "[*a*]*dditional facilities*, such as additional equipment, tracks . . . , buildings, bridges, and all other structures; additions to such facilities, such as extensions to tracks, buildings, and other structures . . . ." (Italics added.) An "addition" may also be called an "additional investment." Moreover, when "investments" were broken down into subcategories in ABL's books and reports, "road property investments" (which would include investments in the original railroad and its extensions) included "land, rails, ties, ballasts, [¶] . . . [¶] [b]ridges, buildings, *yards*, all those sorts of things," according to Crowley. (Italics added.) In short, the Rail Yard was an "investment" in the railroad and its extensions.

The second half of Paragraph 14 tends to confirm this interpretation. In order to "keep an accurate account of the cost of additional investments and extensions," Paragraph 14 required ABL to file an annual verified report of those costs "similar to the report filed with the Railroad Commission." The Railroad Commission report conformed to the Uniform System of Accounts. Therefore, it can be inferred that the drafters

intended the Paragraph 14 annual reports to identify the costs of "investments" as those terms are defined in the Uniform System of Accounts as well. Under that accounting system, "investments" include the Rail Yard.

ABL argues that we held in the prior appeal that the property included in the repurchase right was limited to the original railroad and extensions thereof and did not include additional investments. ABL's misreads our opinion. The issue before us in the prior appeal was whether the repurchase right was written such that, with the assistance of extrinsic evidence, the property subject to the option could be determined with sufficient specificity and certainty to satisfy the statute of frauds and contract law. (*Alameda Belt Line, supra*, 113 Cal.App.4th at p. 18.) In that context, we wrote, "The language of the option greatly narrows and defines the property in issue, insofar as it limits the City's right to repurchase the original railroad and its 'extensions *thereof*.' (Italics added.) Only the original property, or new lands or other property acquired to provide 'extensions' of the operations of the railroad, would seemingly be covered by the repurchase option." (*Id.* at p. 25.) The next sentence demonstrates that the distinction we were drawing was not between extension tracks and ancillary tracks or facilities of the railroad (e.g., the Rail Yard), but between railroad and nonrailroad property: "If ABL acquired other property for nonrailroad purposes, such property would not fall within the option to repurchase." (*Ibid.*) Simply stated, we did not decide what property the parties intended would be subject to the Paragraph 14 option "to purchase said belt line railroad together with extensions thereof." We left that determination to the trial court on remand. We expressly acknowledged that the extent of *railroad* property included in the repurchase option should be determined on remand with reference to extrinsic evidence: "As to the contention that the right of repurchase of the 'extensions thereof' might refer either to all newly acquired lands, or only to the tracks themselves and not the land underneath those tracks, we again point out that extrinsic evidence might be considered to aid in the resolution of this asserted ambiguity." (*Ibid.*)

C. *Consistency with Other Contractual Provisions*

ABL next argues that an interpretation of Paragraph 14 that includes the Rail Yard in the property covered by the repurchase right would be inconsistent with other parts of the 1924 Agreement. It is axiomatic that a contract is to be construed as a whole, each clause helping to interpret the other. (Civ. Code, § 1641; Code Civ. Proc., § 1858.)

Paragraph 3, which describes Southern Pacific's option to buy into ABL, requires Southern Pacific to pay the prorated cost of "all property owned" by ABL.[9] ABL argues that the drafters would not have used different language to describe the property covered by the City's repurchase right ("said belt line railroad including all extensions thereof") and the interest covered by Southern Pacific's option ("all property owned then by [ABL]") unless they intended the phrases to have different meanings. Paragraph 12 refers in the disjunctive to "said belt line railroad, or . . . the property of" ABL.[10] ABL argues the drafters would not have used both phrases unless they had different meanings. ABL contends that the trial court construed "said belt line railroad including all extensions thereof" to be synonymous with all of ABL's property, thus rendering ineffective the drafters' careful choice of language. (See Civ. Code, § 3541; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 750, p. 840.)

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[9] Paragraph 3 of the Agreement gave Southern Pacific an option to buy into ABL by purchasing an interest equal to that of the other parent railroads at "its proper prorata of the cost to the then carrier owners to the date of such acquisition of the organization of said [ABL], and the acquisition, extension, and construction of *all property owned then by it*, including all additions and betterments." (Italics added.)

[10] Paragraph 12 of the Agreement refers back to Paragraph 8, which provided that one or both of the parent railroads had the option of constructing a freight ferry slip, spur track, and connecting track from the original railroad on Clement Avenue over land leased to it or them by the City. Paragraph 12 provided that, if constructed, the track and ferry slip would "not be deemed a part of the aforesaid belt line railroad, or be included as part of *the property of said* [*ABL*]." (Italics added.)

We disagree with ABL's premise that the trial court construed "said belt line railroad including all extensions thereof" to refer to all of ABL's property.[11] The trial court construed the paragraph to encompass the railroad, its extensions (including the Rail Yard), and all additional investments in those assets. The fact that the extent of that property was coterminous with the extent of company's entire property (i.e., the fact that ABL owned no *other* property) did not render the Agreement's references to "all property" of ABL meaningless. The contract was written in 1924 to apply to multiple possible future contingencies. Had Southern Pacific exercised its right to buy into ABL under Paragraph 3 and had ABL at that time owned property other than the original railroad, its extensions and additional investments therein, Southern Pacific would have been entitled to purchase a prorata share, at a prorata cost, of *all* of the property of ABL (with the exception of the ferry slip and tracks expressly excepted in Paragraph 12). The fortuity that ABL, as of the time of this litigation, did not own any property other than the belt line railroad and extension property does not reflect any inconsistency in interpretation of the Agreement, nor in the determinations made by the trial court.[12]

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[11] The parties dispute whether the trial court's judgment in practical effect orders ABL to sell all of its property to the City. ABL contends it does, but the City represents (without citation) that not all corporate property was included in the judgment. We shall assume for purposes of argument that the real property covered by the judgment is all of the real property ABL owns.

[12] In the trial court, ABL argued that the Atlantic Avenue property should not be included in the property covered by Paragraph 14. ABL does not clearly raise this argument on appeal. It generally "question[s] what property is included within the term 'extensions' " and also whether any land interests "included a fee interest or merely an easement." It seeks a ruling that the City recover nothing, based in part on its argument that the repurchase right is limited to easements in its real property and all such easements have been extinguished. It does not identify what property should be included in the option if we reject its easement argument.

Assuming ABL contends on appeal that the Atlantic Avenue Property is not included in the option, we reject the argument on the merits. First, Copple testified that the track that ran over the Atlantic Avenue Property "was an extension from the rail yard." Second, the property is included in the Railroad Commission's description of the

IV. *Easements or Fee Interest in Land*

ABL argues that, as to real property under the railroad, the description of the proposed extension of the railroad in Paragraph 1 of the 1924 Agreement implicitly limits the City's repurchase right to easements permitting the City to run tracks over the land. Specifically, it argues that phrases like "over, along and upon" and "rights of way" in Paragraph 1 (and in the Railroad Commission description of the proposed extension)[13]

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proposed extension, which included a path from a point north of Buena Vista Avenue and Benton Street and 1,000 feet south of the estuary, thence "in a general westerly direction over private rights of way and crossing all intervening streets to the westerly side of Webster street [the rail yard] . . . and continuing westerly over private rights of way and crossing all intervening streets to the shore line of San Francisco Bay . . . ." The ICC decision similarly wrote that the "extension" included a "westerly extension [from the existing railroad] to the shore line of San Francisco Bay," and specifically referred both to an "extension from the present westerly terminus [of the existing railroad] to the west line of Webster Street" and to a "further extension from the west side of Webster Street to the shore line of San Francisco Bay." Crowley also testified that "purpose" (or plan) of the 1924 Agreement was "to extend those [existing] railroad landing tracks out to the San Francisco Bay." Alternatively, the track along Atlantic Avenue was ancillary track that constituted an "additional investment" in the original railroad and its extensions. Copple testified that the track was spur track.

[13] Paragraph 1 provides in relevant part: "*over, along and upon* the line of the existing railroad belonging to the City of Alameda, on Clement Avenue between Broadway and Grand Streets in said City, and, in addition thereto, *over, along and upon* those certain streets in said City particularly described as follows, to-wit:
[¶] (a). Beginning at a point in the existing track on Clement Avenue in said City at or near the western line of Broadway, thence by a single track westerly, parallel and operating in conjunction with the City's existing track thereon to a point near the eastern line of Park Street; [¶] (b). Beginning at a point in the existing track on Clement Avenue near Minturn Street thence by a single track on an 'S' curve *over and along* private *rights of way* and intervening streets southerly and westerly to Buena Vista Avenue near Hibbard Street; thence by a single track *over and along* the sidewalk area on the northern side of Buena Vista Avenue westerly from Hibbard Street to a point between Benton Street and Bay Street; thence by a single or double track curving northerly and westerly *over private rights of way* and intervening streets to a point north of Eagle Avenue and continuing westerly *over other private rights of way* and crossing all intervening streets to the western side of Webster Street at or near the so-called 'segregation line' in said city; [¶] (c). And also such other streets and *rights of way* in said City, the right to use which shall have been lawfully granted to said [ABL]." (Italics added.)

indicate that any real property interest in the "extension" described in Paragraph 14 is limited to an easement, just as the real property interests conveyed to ABL with respect to the existing railroad and with respect to extensions that would travel over City streets were limited to easements (the franchises described in Paragraph 7 and conveyed pursuant to a contract that was admitted at trial).[14]

According to the expert testimony presented at trial, however, the railroad terms used in Paragraph 14 include any and all land interests ABL owned below its tracks or as investments in the railroad. Crowley testified that "road" property refers to the rail and

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The Railroad Commission decision describes the extension as follows: "Beginning at a point in the existing track on Clement Avenue near Minturn street; thence by a single track on an S curve *over and along* private *rights of way* and intervening streets southerly and westerly to Buena Vista avenue at Hibbard Street; thence westerly *along* the northern side of Buena Vista avenue to a point thereon between Benton street and Bay street; thence by a single or double track curving northerly *over private rights of way* and intervening streets and continuing in a northerly direction to a proposed freight ferry slip on the estuary of San Antonio; and also running from a convenient point on said proposed line located about 1,000 feet southerly from said proposed freight ferry slip, in a general westerly direction *over private rights of way* and crossing all intervening streets to the westerly side of Webster Street at or near the so-called 'segregation line,' and continuing westerly *over private rights of way* and crossing all intervening streets to the shore line of San Francisco Bay, a distance of 14,600 feet, more or less." (Italics added.)

By way of comparison, the ICC decision describes the extension as continuing from the original railroad "in a general . . . westerly and northerly direction to a proposed car-ferry slip at the foot of Morton Street (if projected), with a further westerly extension to the shore line of San Francisco Bay, a distance of 14,600 feet."

[14] Based on our review of the record, it appears that ABL did not raise this specific argument below. It may have been deterred by the trial court's rulings in its statement of intended decision and final statement of decision that "[d]uring trial, the parties agreed that there was no dispute about the land subject to the repurchase option in Paragraph 14, except for their disagreement about whether the railyard was an 'extension.' " The court cited statements by ABL's counsel as a concession that there was no dispute about what land was subject to the repurchase option. We read counsel's statements as concessions about ABL's *ownership* of the property that had been identified by the City, but not a concession that the property was included in the repurchase option. Therefore, we address ABL's easement argument on the merits.

all assets below the wheels of the train. He defined "extensions" as including both "land and fixed improvements." He testified that "investments" included rail yards. Paragraph 14, which is the section of the Agreement that directly describes the City's repurchase option, uses the terms "extensions" and "investments" without qualification as to the extent of the land interests involved.

ABL argues that phrases such as "over, along and upon" in Paragraph 1's description of the proposed extension *limit* the repurchase right to an easement over the land. This argument fails for several reasons. First, the argument depends on the premise that the City's repurchase right is limited to the original railroad and the extension described in the "original plan," which is described in Paragraph 1. We have already held (a) that there is a conflict in the evidence about whether "extension" as used in Paragraph 12 is limited to an extension described in an "original plan"; (b) the "original plan" is not narrowly defined in Paragraph 1 (see subd. (c)) or in the ICC and Railroad Commission decisions approving the acquisition and expansion of the railroad; and (c) the repurchase right includes "investments" in addition to the original railroad and its extension lines.

Second, even if we accept that the repurchase right is limited to the property described in Paragraph 1, ABL has not demonstrated that phrases such as "over, along, and upon" limit the land interests to easements. Citing cases that interpret railroad deeds, which are relevant because they apply the same rules of interpretation as applied to the interpretation of any contract (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238 (*Manhattan Beach*)), ABL urges us to apply a " 'general rule . . . that "in construing contracts and deeds for railroad rights of way such deeds are usually construed as giving a mere right of way, although the terms of the deed would be otherwise apt to convey a fee. [Citations.]" ' " (*Id.* at p. 240, citing *Highland Realty Co. v. City of San Rafael* (1956) 46 Cal.2d 669, 678.) A full reading of *Manhattan Beach* demonstrates that the Supreme Court has not endorsed the quoted "general rule."

Immediately after the sentence quoted by ABL, the court inserted a footnote in which it distinguished *Highland Realty* and stated, "In the context of this case, it is . . . unnecessary to assess whether it remains the 'general rule' that the grant of a railroad right-of-way conveys only an easement." (*Manhattan Beach*, at p. 240, fn. 7.) The court also cited *Machado v. Southern Pacific Transportation Co.*, which holds "there is no preference for construing a grant to a railroad as an easement instead of a fee." (*Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 355-356, 360-361 (*Machado*), cited in *Manhattan Beach*, at p. 240, fn. 7.) A subsequent Court of Appeal decision agreed with *Machado* on this point. (*Severns v. Union Pacific Railroad Co.* (2002) 101 Cal.App.4th 1209, 1216 ["references to a right-of-way do not suggest an easement"]; see also *id.* at p. 1217.) The "general rule" advanced by ABL, therefore, has little support in California case law.

Manhattan Beach further observed that "courts have also concluded 'the term "right of way," when applied to railroads, canals, and similar instrumentalities, has no exact, well-defined meaning, but often is susceptible of a twofold signification. It is used indiscriminately to describe, not only the easement, or special or limited right to use another person's land, but as well the strip of land itself that is occupied for such use. This, at any rate, is the case when the term is used with respect to railroads. [Citations.]' [Citations.]" (*Manhattan Beach*, *supra*, 13 Cal.4th at pp. 241-242, citing *Concord & Bay Point Land Co. v. City of Concord* (1991) 229 Cal.App.3d 289, 295 ["A right-of-way, of course, may be an easement to pass over land, but the term 'is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it,' " quoting Black's Law Dictionary (5th ed. 1979) p. 1191].)

In sum, *Manhattan Beach* applied no general rule of interpretation to the "rights of way" language in the deed before it. On the contrary, it began with the legal presumption that a deed conveys a *fee simple* title absent contrary evidence, and emphasized that

" ' "Every transaction must be considered individually." [Citation.]' [Citations.]" (*Manhattan Beach, supra,* 13 Cal.4th at pp. 242-243.) One of the features of the deed before it, which suggested conveyance of an easement, was language that it conveyed a " 'right of way for the construction, maintenance and operation of a steam railroad, [*is*] *upon*[,] *over and along the following tract and parcel of land*' and *over and through* the lands of grantors . . . .' (Italics added.)" (*Id.* at p. 244.) The court stated that the quoted language "in the nature of an appurtenance appears to limit the railway to a right of passage and exclude title to the land beneath." (*Ibid.*) However, the language was by no means determinative. (*Ibid.*; see also *Machado, supra,* 233 Cal.App.3d at pp. 359-360 [the phrase " 'over and across the land of the grantor' . . . seems to suggest, *but does not require*, construction as an easement, rather than a fee," italics added].) The court concluded that other language in the deed combined with extrinsic evidence of the parties' intent indicated that the deed conveyed a fee interest rather than an easement. (*Manhattan Beach,* at pp. 235, 238-239, 243-246.)

Similarly, we conclude that the railroad terms "extension" and "investment," which are used without qualification in the paragraph of the 1924 Agreement that describes the City's repurchase option, indicate that any and all land interests owned by ABL as "extensions" of or "investments" in the railroad are covered by the purchase right. The "appurtenance" and "right of way" language in Paragraph 1 does not clearly convey a different intent and thus does not alter our interpretation of the repurchase right.

Because we do not agree with ABL's argument that the City's repurchase option as to land owned by ABL was limited to the purchase of an easement, we need not address its argument that such easements have been extinguished by the end of the railroad's operations. ABL certainly does not contend that its *own* interest in any of the property covered by the judgment is limited to an easement that has been extinguished.

V. *Frustration of Purpose*

ABL argues that, under the doctrine of frustration of purpose, the Paragraph 14 repurchase right is no longer enforceable because the purpose for the option no longer exists.

The doctrine of frustration of purpose applies when "[p]erformance remains possible, but the *fundamental reason of both parties* for entering into the contract has been frustrated by an unanticipated supervening circumstance, thus destroying substantially the value of performance by the party standing on the contract." (*Cutter Laboratories, Inc. v. Twining* (1963) 221 Cal.App.2d 302, 314-315 (*Cutter Laboratories*).) As stated in the Restatement Second of Contracts, "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." (Rest. 2d Contracts, § 265.)

The doctrine does not apply here. First, the principal purpose of the contract has not been substantially frustrated. Clifton E. Hickock, City Manager for the City of Alameda in 1924, testified during regulatory hearings that the objectives of the Agreement were "that all three [transcontinental railroads] be given access [to the belt line railroad] . . . that the railroad must be extended at once, that the City of Alameda should be relieved of the immediate expense, and that we should have the privilege of acquiring the railroad back." The purpose of the Agreement was carried out for 74 years: Western Pacific and Santa Fe formed ABL, which purchased and extended the belt line railroad and operated it for 74 years. The City's exercise of its repurchase right is also consistent with the purpose of the Agreement.

ABL attempts to narrowly define the purpose of Paragraph 14 of the Agreement as an option to permit the City to repurchase the railroad solely in order to operate it as a

municipal belt line railroad. Although Paragraph 14 in no way conditions the City's repurchase option on any particular use of the property, ABL cites testimony by City Manager Hickock during the regulatory hearings as extrinsic evidence to impose such a restriction. In response to a question about whether the City was attempting to create a situation "comparable to that existing along the water front of San Francisco where the State Belt Railroad serves as a neutral agency for all line haul carriers," Hickock replied, "The ideal solution from the City of Alameda's standpoint would have been for us to extend the railroad ourselves and to operate it similarly to what is done in San Francisco, but we were prevented from doing [so] by the fact that we were not able to finance it, so we considered that this solution . . . attains similar results, particularly as we have the right at any time upon a year's notice of buying back the railroad and taking it over and operating it as a municipality." This testimony demonstrates that the City contemplated that it might exercise its repurchase right for the purpose of acquiring and operating the railroad itself. However, it does not establish that this was the *only* purpose of the repurchase option. Elsewhere in the record of the regulatory proceedings, the City described the repurchase right generally as a way to protect its unspecified interests. Testifying specifically about the purposes of the contract, Hickock testified that "the City of Alameda would be protected in the future by having the power to buy back the property." The City's brief to the Railroad Commission stated that "the contract reserves to the City the right to repurchase the belt line and its extensions if at any time in the future it should be deemed advisable so to do." These statements indicate that the repurchase right was intended to *generally* protect the City's interests, possibly by allowing it to regain control of the public property it turned over to ABL, as well as any other property acquired by ABL to operate a belt line railroad in the public interest. ABL has not shown that the purpose of repurchasing the property in order to operate a municipal belt line railroad was "so completely the basis of the contract that, as both

parties underst[oo]d, without it the transaction would make little sense." (Rest. 2d Contracts, § 265, com. (a).)

Second, the ceasing of railroad operations was not an "unanticipated supervening circumstance," the "non-occurrence of which was a basic assumption on which the contract was made." (*Cutter Laboratories, supra*, 221 Cal.App.2d at p. 315; Rest. 2d Contracts, § 265.) The expansion of the belt line railroad was an inherently uncertain venture. The parties hoped that the extension of the belt line railroad would encourage industrial development on the waterfront, which would increase the City's tax base and generate transportation revenues for the parent railroads. However, an increase in development was not guaranteed, nor was there any guarantee the industry, once developed, would stay in Alameda forever. The Agreement had an indefinite term and the ancillary franchise agreement between ABL and the City had an initial term of 50 years, which was extended another 25 years. Long-term contracts are common in the railroad industry. The loss of industry and of the need for the railroad were within the risks the parties assumed when they entered into the contract.

Third, the change in circumstances has not substantially destroyed the value of the City's performance under Paragraph 14 of the Agreement. (*Cutter Laboratories, supra,* 221 Cal.App.2d at p. 315.) In fact, the value of the City's performance is unaffected. The repurchase price ABL would have received for the property if the City had intended to use it to operate a municipal belt line railroad is exactly the same as the price it will receive under the trial court's order: the original costs of the railroad, its extensions, and additional investments. Other parts of the Agreement demonstrate that the parties anticipated that property values might substantially increase, thus instilling significant value in the City's right to repurchase property at cost. Paragraph 9, which established the rent ABL would pay for City land if it constructed the ferry slip pursuant to Paragraph 8, provided that the rent would "be equitably adjusted at the end of each 10-year period . . . according to the then value of said property in an unimproved condition,

as compared with its present value, and if said parties, or party, and said City are unable to agree, such question of then value as compared with present value shall be submitted to arbitration . . . ." The arbitration provision recognizes that the property values might increase substantially, thus causing a dispute the parties would have difficulty resolving among themselves. In Paragraph 14, however, the repurchase price is set at cost, not at fair market value. It can be inferred that the parties anticipated that the value of the property acquired by ABL to extend the railroad might substantially increase before the City exercised its repurchase option, and agreed that the City, as part of its benefit of the bargain under the Agreement, would capture that increase in value by paying only cost for the property. The increase in property value was "within the risks . . . assumed under the contract" by ABL. (Rest. 2d Contracts, § 265, com. (a).)

DISPOSITION

The judgment is affirmed. The City of Alameda shall receive its costs on appeal.

_____
Bruiniers, J.*

We concur:

_____
Jones, P. J.

_____
Simons, J.

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.